IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10716 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BANSIBHAI RAMABHAI KAHAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10716 of 2002

MR RJ GOSWAMI for Petitioner No. 1

MR VM PANCHOLI, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 22/01/2003

ORAL JUDGEMENT

#. By filing this petition, the petitioner-detenu has challenged the detention order dated 17.5.2002, by which,

he is detained by the Police Commissioner, Vadodara City, in exercise of the powers conferred upon him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as "PASA" for short). The detention order was served to the petitioner-detenu while he was in judicial custody in connection with the criminal case.

#. As per the grounds of detention, three criminal cases are filed against the petitioner-detenu, description of which is given at serial nos.1, 2 and 3 of the detention order. It is alleged against the petitioner-detenu that, he is disturbing public peace and public order, as, he is a communal minded person and is trying to disturb the properties of Muslims by damaging their houses and shops etc. Along with the detention order, statements of two witnesses are also supplied. So far as the last criminal case is concerned, the same is registered at Navapura Police Station as Case No.94 of 2002 under sections 326, 332 and 135 of the Bombay Police Act. So far as the aforesaid case is concerned, it is alleged against the petitioner-detenu that, he has tried to assault the Police Inspector. On the basis of the said ground, the petitioner-detenu is detained by way of preventive detention.

#. Looking to the nature of grounds alleged against the petitioner-detenu, in my view, it can safely be said that the petitioner-detenu is disturbing public order, as, because of his activities, communal peace of the city is disturbed. The petitioner-detenu, therefore, is rightly described by the detaining authority as "dangerous person" under the provisions of the PASA.

#. Learned advocate, for the petitioner-detenu, however, submitted that, at the time when the detention order is passed against the petitioner-detenu, he was already in judicial custody, and that it is mentioned in para 7 of the detention order that the petitioner-detenu is likely to be released on bail at any time by filing appropriate bail application. It is argued that, there is no material available on record, by which, it can be said that the petitioner-detenu is likely to prefer bail application and is likely to be released on bail. It is also submitted that, looking to the seriousness of the alleged criminal case, it cannot be easily inferred that the petitioner-detenu is likely to be released on bail by the competent court. The detaining authority, therefore, has not considered the aforesaid aspect properly and has merely observed in the detention order that the petitioner-detenu is likely to be released on bail for

which, there is no material available for coming to such conclusion. Mr.Goswami has relied upon the decision of the Apex Court reported in AIR 2000 SC 3675 wherein in paras 4, 6 and 7, the Supreme Court has observed as under.:

" xxxx xxxx xxxx

4. In Augustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 CriLJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-

"Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."

xxxxx xxxxx xxxx

6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is `likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available

is the `likelihood of his moving an application for bail' which is different from `likelihood to be released on bail'. This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.

xxxxx xxxxx xxxx"

#. Mr.Pancholi, learned AGP, however, submitted that the petitioner is a dangerous person, and, therefore, he is required to be detained by way of preventive detention, so that, he may not repeat similar type of incidents in future.

#. Considering the arguments of both the sides, in my view, there is substance in the argument of Mr.Goswami to the effect that, there is no material available with the detaining authority for coming to the conclusion that the petitioner-detenu is likely to be released on bail by the competent court, even though, the criminal case at serial No.3 in the detention order is of a serious nature. Considering the aforesaid aspect of the matter as well as considering the fact that, at the relevant time, no material was available with the detaining authority to the effect that the petitioner-detenu is likely to move any bail application. The detaining authority merely mentioned in the detention order that the petitioner-detenu is likely to be released on bail, but in the present case, there is no cogent material for coming to the said conclusion. Mr.Goswami, at this stage, fairly submitted that, even otherwise, the petitioner will not move the competent court for getting bail by filing appropriate bail application at least upto 1.4.2003. This statement is merely recorded, so that, the learned Assistant Government Pleader can point out this fact to the learned Prosecutor, who is dealing with the said criminal case, which is pending against the petitioner-detenu. Of course, this statement may not have any bearing so far as the present petition is concerned, as, the same is required to be decided on its

own merits. However, if at all any bail application is preferred by the detenu, the learned Prosecutor, in charge of the matter, can consider this aspect at the time of opposing such bail application on its own merits. It is also clarified that, this Court has not expressed any opinion, whether any bail application can be entertained by the competent court and it is for the competent court to decide the same on its own merits and in accordance with law.

#. Considering the aforesaid aspect of the matter, more particularly, the aspect to the effect that the petitioner is already in judicial custody and in view of the fact that there was no cogent material before the detaining authority for coming to the conclusion that the petitioner is likely to be released on bail by the competent court and in view of the judgment of the Supreme Court, as referred to above, the order of detention is required to be quashed and set aside.

#. The petition is allowed. The order of detention dated 17.5.2002 is quashed and set aside. The detenu Bansibhai Ramabhai Kahar is ordered to be set at liberty forthwith if he is not required in any other case or the criminal case which is referred to above. Rule is made absolute accordingly. Direct service is permitted.

(P.B.Majmudar,J)
(pathan)